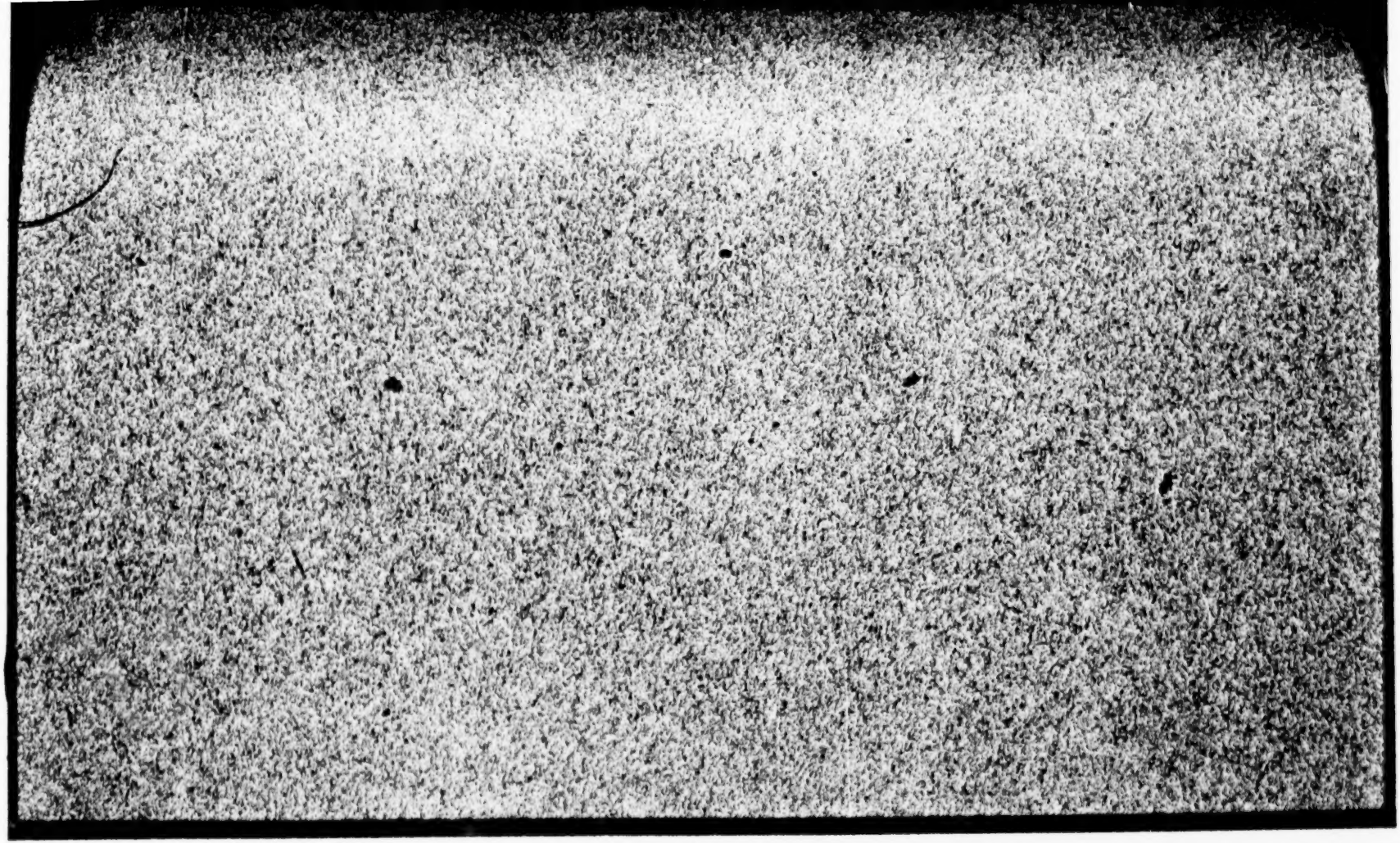

FILE COPY

MAR 31 1930
CHARLES ELMORE CROPLEY
CLERK

(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. ~~435~~ 14

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

LEON E. MORRIS,
Crocker First National Bank Building, San Francisco,
Counsel for Appellants.

EDWARD M. JAFFA,
Crocker First National Bank Building, San Francisco,
Of Counsel.

Subject Index

I. Opinion of the court below 1
II. Jurisdiction 2
III. Statement of case 3
IV. Questions of law 5
V. Argument 6
Summary of argument 6
Point A. The State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce 8
Point B. The State Belt Railroad (owned and operated by the State of California) is not subject to the Federal Safety Appliance Act 17
1. The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty and therefore does not apply thereto 17
2. The United States has no right to impose a fine or penalty upon the State of California 22
3. The United States has no right to impose a fine or penalty upon officers of the State of California for acts occurring in the regular performance by them of a governmental function of said State 28
Point C. If the complaint and judgment be against defendants in their official capacity, then the District Court did not have jurisdiction of the action 33
Point D. The judgment cannot be sustained if it be deemed against defendants in their private capacity 35
1. Defendants are not liable in their private capacity, because the Act imposes a penalty only upon the carrier and not upon any individual or officer thereof 37
2. Defendants are not liable in their private capacity, because of the nature of the alleged infractions of law 43
(a) Defendants cannot be held personally responsible for violations of law (or any other tort) occurring without their personal knowledge, participation or consent and contrary to their orders and instructions 43
(b) Defendants as public officers are not personally responsible for the torts of their subordinate officers 45
VI. Conclusion 49

Table of Authorities Cited

Pages

In re Ayers, 123 U. S. 443; 31 L. Ed. 216 ..... 28, 34

Buffington v. Day, 78 U. S. 113; 20 L. Ed. 122 31

Chicago, Burlington & Quincy Railway v. United States, 220 U. S. 559; 55 L. Ed. 582 38

In re Commonwealth of Kentucky v. William Dennison, Governor of the State of Ohio, 24 Howard (U. S.) 66; 16 L. Ed. 717 ..... 28, 34

Cunningham v. Macon etc. R. R. Co., 109 U. S. 446; 27 L. Ed. 992 25

Denning v. State, 123 Cal. 316, 320 ..... 10, 25

In re Fowble, 213 Fed. 677 20

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152; 56 L. Ed. 706 ..... 5, 19

Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642 ..... 29, 34, 44

Kentucky & Ind. Bridge Co. v. Louisville & Nashville R. R. Co., 37 Fed. 267 13

McCallum v. United States, 298 Fed. 373 ..... 13, 35, 36, 37

M'Culloch v. Maryland, 4 Wheat. (U. S.) 316; 4 L. Ed. 579 31

Michel v. Smith, 188 Cal. 199 45

Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754, 766 ..... 12, 25, 27

Riddoch v. State of Washington, 68 Wash. 329, 335; 123 Pac. 450 ..... 12, 26, 27

Robertson v. Sichel, 127 U. S. 507-515; 32 L. Ed. 203, 206 ..... 24, 46, 47

State of Rhode Island v. The State of Massachusetts, 12 Peters 657; 9 L. Ed. 1233 34

Smith v. Reeves, Treasurer of State of California, 178 U. S. 436; 44 L. Ed. 1140 ..... 26, 28, 34

Sullivan v. School Dist. No. 1, City of Tomah, 179 Wis. 502; 191 N. W. 1020 21

Page

United States v. Board of Com'rs. of McIntosh County, 271 Fed. 747, 750 31
United States v. Brooklyn Eastern District Terminal, 249 U. S. 296; 63 L. Ed. 613 14
United States v. Herron, 20 Wall. 251; 22 L. Ed. 275..... 20
United States v. The State of Texas, 143 U. S. 621; 36 L. Ed. 285 34
United States v. Union Stockyards Co., 226 U. S. 286; 57 L. Ed. 226 15

Table of Statutes and Constitution Cited

Pages

Constitution of the United States, Article III, Sec. 2.... 33
Constitution of the United States, Amendment Eleven.... 26
Federal Safety Appliance Acts:
Act of Cong., March 2, 1893, c. 196 (27 Stat. 531), Sec. 1 9
Act of Cong., March 2, 1893, c. 196 (27 Stat. 531), as amended by Sec. 1 of Act of Cong., March 2, 1903, c. 976 (32 Stat. 943), Sec. 2.....17, 39
Act of Cong., March 2, 1893, c. 196 (27 Stat. 532), as amended by Act of Cong., April 1, 1896, c. 87 (29 Stat. 85), Sec. 6.....18, 39
Act of Cong., April 14, 1910, c. 160 (36 Stat. 298), Secs. 2 and 3 18
Act of Cong., April 14, 1910, c. 160 (36 Stat. 299), Sec. 4 18
Hours of Service Act:
Act of Cong., March 4, 1907, c. 2939 (34 Stat. 1415), Sec. 1 39
Act of Cong., March 4, 1907, c. 2939 (34 Stat. 1416) Secs. 2 and 3 39
Judicial Code, Sec. 233; Act of Cong., March 3, 1911, c. 231 (36 Stat. 1156) 34
Judicial Code, Sec. 239; Act of Cong., February 15, 1925, c. 229 (Sec. 1, 43 Stat. 938)..... 2
Political Code of California, Section 2520..... 28
Political Code of California, Section 2524..... 3

(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 486

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

I.

OPINION OF THE COURT BELOW.

This case is before this Court on certified questions of law from the United States Circuit Court of Ap-

peals for the Ninth Circuit, and, therefore, no opinion by the Court below has been rendered or is involved.

II.

JURISDICTION.

Said questions were certified by said United States Circuit Court of Appeals, pursuant to Judicial Code Section 239, as amended in 1925. Act of Cong., February 15, 1925, C. 229, § 1, 43 Stat. 938.

III.

STATEMENT OF CASE.

This action was brought by the United States against William A. Sherman, M. F. Cochrane, and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, defendants, to recover statutory penalties for nine alleged violations of the Federal Safety Appliance Act and amendments thereto.

A jury was waived and the cause submitted upon a written stipulation of facts and judgment entered by the Trial Court for nine hundred ($900.00) dollars against defendants as above named and designated. From this judgment the defendants appealed to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 1.)(Tr. 22, 43)

In the certificate of the United States Circuit Court of Appeals, the appellants are referred to as defend-

ants and for convenience, they will be hereinafter so referred to.

The acts complained of consisted of hauling cars with defective coupling devices and drawbars, and occurred upon and in the course of the operation of what is known as the State Belt Railroad. The said railroad is owned and operated by the State of California and located wholly within the City of San Francisco. (R. 1, 2.) (Tr. 25) The said railroad is operated by the State for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom. The charges made for the services rendered by the railroad are made pursuant to the authority conferred by Section 2524 of the Political Code of California, which authorizes collection of such an amount of revenue as will enable the State officers to perform their duties as required of them by authority of Article IX of the Political Code. (R. 4.) (Tr. 25-26; 34)

The character of the State Belt Railroad and the nature of the services performed by it are specifically covered in the statement of facts in the certificate of the United States Circuit Court of Appeals. (R. 2, 3, 4.) (Tr. 26-33)

Briefly stated, this railroad, operated by the State of California, furnishes switching services to and from wharves, car ferries, railroad yards and the industries located along and adjacent to the waterfront of the City of San Francisco. The only equipment of said railroad consists of locomotives, a roundhouse

and tracks along the waterfront. It neither owns nor operates any cars. It renders switching services only.

The defendants are appointive State officers and constitute what is designated under the State statutes, as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the State Belt Railroad. It is operated under the immediate and personal supervision of a superintendent appointed by and holding office at the pleasure of said Board. All persons having anything to do with the maintenance and operation of said railroad are employees and servants of the State. Due diligence was used by the defendant Harbor Commissioners in the selection of employees including (at the times mentioned in the complaint) five inspectors whose duty it was to make inspections of all appliances covered by the Federal Safety Appliance Act and orders of the Interstate Commerce Commission issued pursuant thereto. (R. 4.)(Tr. 25-27)

The defendants did not personally operate or supervise the operation of the State Belt Railroad. They did not personally participate in and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act complained of, and if such violations or any of them occurred, it was without their knowledge, without their consent and contrary to their orders and instructions. (R. 4.) (Tr. 28)

This action is in the nature of a *test case*. It was submitted to the District Court upon an agreed stipulation of facts for the purpose of squarely presenting

the essential and vital points involved in the question of what liability *if any* rests upon the Board of State Harbor Commissioners, either in their official capacity as officers of the State (i. e., liability of the State of California) or in their private capacity as individuals for violations of the Federal Safety Appliance Act *occurring without their personal participation, without their knowledge or consent and contrary to their orders and instructions.*

The defendants urge that they are *not* liable in *either* capacity for any such violations. Their contentions are summarized in detail at the opening of the argument *infra.*

IV.

QUESTIONS OF LAW.

The following questions of law are certified to this Honorable Court by the said United States Circuit Court of Appeals:

1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?

2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? (*Guarantee Company v. Title Guaranty Company,* 224 U. S. 152, 155, et seq.)

3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?

4. Upon the other hand, if the judgment be deemed to be against the defendants in their private capacity, can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier": and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge, but was contrary to their orders and instructions?

V.

ARGUMENT.

The argument will follow the order of the above questions.

Summary of Argument.

Point A. That the State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

Point B. That the State Belt Railroad (owned and operated by the State of California) is not subject to

the Federal Safety Appliance Act. The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty and therefore, does not apply thereto. It could not properly so apply because the United States has no right to impose a fine or penalty upon the State of California or upon the officers of the State of California, for acts occurring in the regular performance by them of a Governmental function of said State.

Point C. That if the complaint and judgment be construed as running against the members of the Board of State Harbor Commissioners in their official capacity and hence against the State, then the District Court of the United States did not have jurisdiction of the action.

Point D. That if the judgment be deemed against defendants in their private capacity, then it cannot be sustained, because

(a) The Act imposes a penalty upon the "carrier" only and *not* upon any individual or officer thereof;

(b) Defendants did not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrong-doing was not only without their participation, consent and knowledge but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. The defendants are not personally liable for the torts of their subordinate officers.

POINT "A."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE.

The determination of the character of the State Belt Railroad is one of vital interest to the State of California and to all other states having harbors or ports.

The real question to be determined here is basic and resolves itself into this:

Can a sovereign state, in the performance of its governmental functions in maintaining a harbor, render switching service over its own lines between its own docks and the nearby industries and yards of interstate commerce carriers without itself becoming a common carrier engaged in interstate commerce?

We urge that the answer to this question must be in the affirmative.

If it be possible for a state to so act, and we contend it is, then the State of California, through the State Belt Railroad is merely rendering such service, and is not a common carrier engaged in interstate commerce.

From the certificate of the Circuit Court it appears that the State of California, in connection with the operation and maintenance of said State Belt Railroad, has no property whatsoever other than locomotives and tracks located upon property belonging to the State of California; that it is not a party to any through rate agreement; has no dealings whatever with shippers; that it issues no bills of lading nor does it move any cars on waybills, and that it charges

a flat rate per car for switching, the rate being a little higher for a loaded car than an empty one.

The State of California, through the State Belt Railroad, is thus shown to perform only a switching service pure and simple, and to do nothing else. If it be determined to be a common carrier engaged in interstate commerce, then it is impossible for a sovereign state, in connection with its operation of a port, to render switching service without assuming the liabilities of a common carrier and subjecting itself to all of the rules and regulations of the Interstate Commerce Commission, and similar statutes. The question, as above submitted, is therefore squarely presented in the case at bar.

We believe that this is a case of first impression in this Court and, with the exception of one case to be hereinafter mentioned, of first impression in the country, in that it involves switching services rendered by a *sovereign State over its own property* as an incident to the operation and maintenance of *its harbor*, to-wit, the Port of San Francisco.

This is a *controlling fact.*

The Federal Safety Appliance Act relates only to common carriers *engaged* in interstate commerce. Section 1 provides:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any *common carrier engaged in interstate commerce* by railroad to use on its line * * *." (Italics ours.)
>
> Act of Cong., March 2, 1893, c. 196. (27 Stat. 531.)

The subsequent sections of this Act material to this case refer to "such common carrier."

The element of *engaging* in interstate commerce is thus material. The *mere fact* that freight in the course of an interstate shipment is *upon the tracks* of the State Belt Railroad is *not* controlling.

The State of California does *not engage* in interstate, or any, commerce. It is *not* engaged in the *business* of a common carrier or any other business. It *is* engaged in the *governmental function* of maintaining a harbor.

The maintenance of the Harbor of San Francisco has been held to be a governmental function by the Supreme Court of the State of California.

Denning v. State, 123 Cal. 316.

Said case involved an action for tort by a deckhand employed upon a fire tugboat belonging to the State and used by the Board of State Harbor Commissioners. The Court held that the State was not liable for such tort and in the course of its opinion, the Court stated (123 Cal. 320):

> "Article 15 of the constitution contains the following provisions:
>
> 'Section 1. The right of eminent domain is hereby declared to exist in the state to all frontages on the navigable waters of the state.
>
> 'Section 2. No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of

such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof.

'Section 3. All tide lands within two miles of any incorporated city or town in this state and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations.'

These provisions of the constitution clearly show that the state has retained the control of the harbors and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury: *and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose.* It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. The construction of seawalls, wharves, piers, boats, et cetera, require contracts for material and labor, and the state is liable upon its contracts. And so the board is authorized to conduct the business of a wharfinger, collecting tolls and charges for loading and unloading freight upon its wharves, storage thereon, et cetera, a business that might be conducted by an individual or private corporation, but all such business necessarily involves matters of contract upon which the state may become liable. But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it; keeping open passageways for the ferryboats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the estate and

connected with the wharves and piers, or used by said board. *These duties are of a police character and purely governmental.* * * *"

"So here, the fact that the board is authorized and required to collect tolls and charges under the act does not make the board an instrument or agency of the state for profit, or convert it into a mere business enterprise. *The act creating the board and defining its powers and duties was inspired and authorized by the constitution itself in the interest and for the benefit of the people through the promotion of commerce, which is always one of the chief cares and imperative duties of all governments.*" (Italics ours.)

The language of the Court above quoted relative to certain duties which might perchance give a right of action against the State refers to actions upon *contract* only, and *not* upon tort.

Where a State engages in an activity ordinarily private in its nature, the said activity thereby becomes impressed with the sovereign character of the State.

"* * * The State is inherently sovereign at all times and in *every capacity.* * * * It can do no act except in the exercise of this sovereign power and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power." (Italics ours.)

Riddoch v. State of Washington, 68 Wash. 329, 335; 123 Pac. 450;

Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754, 766.

Therefore, regardless of the character of the State Belt Railroad if privately operated, it cannot be held

to be engaged in interstate commerce when operated by the State of California.

The one exception, above mentioned to this being a case of first impression, is *McCallum v. United States,* 298 Fed. 373.

Defendants contended below and now contend that this earlier decision relating to the State Belt Railroad is erroneous and should be overruled. It is fully discussed under point "D" *infra.*

The cases discussing the general character of switching service and terminal facilities though not controlling are illuminating.

One leading case passing upon the particular character of switching service is *Kentucky and Ind. Bridge Co. v. Louisville & Nashville R. R. Co.,* 37 Fed. 567.

This case, in so far as applicable to the case at bar, involved the switching of freight over a bridge, the traffic being clearly interstate in character. The Court, in the course of a very long opinion, held (37 Fed. 615):

> "That petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of Section 1 of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company or agency engaged in performing a switching service for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line of connection to another."

The foregoing decision is squarely in point upon the general facts here involved; the service rendered being of the same character in said case as that rendered by the State Belt Railroad, viz.: the simple switching of cars at a per car charge.

Cases holding terminal railroads to be common carriers engaged in interstate commerce when they furnish terminal facilities for railroads engaged in such commerce are not in point in that they show that said terminal railroads furnish facilities or perform acts of one sort or another which placed them in the category of common carriers—acts and services not done or rendered by the State of California in the operation of the State Belt Railroad. Typical of this class of cases is

United States v. Brooklyn Eastern District Terminal, 249 U. S. 296; 63 L. Ed. 613.

Mr. Justice Brandeis, in rendering the opinion of the Court in said case, stated, in discussing the character of a terminal railroad (249 U. S. 306):

> "What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid ship-

ments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination, except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the consignees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less-than-carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respect, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations."

Another such case is *United States v. Union Stockyards Co.*, 226 U. S. 286; 57 L. Ed. 226.

Said case involved three corporations, lease and profit sharing arrangements between them and the rendering of ordinary railroad service such as loading and unloading and accepting less-than-carload shipments. The real basis of the Court's decision, as indicated in the opinion of Mr. Justice Day was (226 U. S. 306):

> "We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the Act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that Act."

Such examples may be multiplied indefinitely. An examination of the facts involved in all cases holding

belt and terminal railroads to be common carriers engaged in interstate commerce will show that such roads perform some regular railroad service—some service directly connected with the handling of the property transported, the issuing of bills of lading and waybills, direct dealings with the shippers or collection of the transportation charges from the shippers as agent for the interstate carrier.

Underlying all of these cases is the basic principle that the belt or terminal railroad involved is engaged in the *business* of a common carrier and in the *business* of handling interstate commerce.

The State of California, in the operation of the State Belt Railroad, does *not* perform any of the above mentioned railroad services. It is *not engaged* in the *business* of a common carrier or in the *business* of interstate commerce.

A sovereign State, as above noted, in operating a belt railroad in connection with the operation and maintenance of its harbors, stands in a unique position, and regardless of what the decision would be were the State Belt Railroad privately operated, the State of California, in operating it, cannot be held to be engaging in interstate commerce.

The conclusion is compelled, therefore, upon both of the foregoing grounds, that the State Belt Railroad (owned and operated by the State of California) is *not* engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. It is, therefore, respectfully submitted that the answer of this Honorable Court to the first question certified by the

United States Circuit Court of Appeals, should be "No."

POINT "B."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT.

1. The Federal Safety Appliance Act Does Not Expressly Refer to a State or Other Sovereignty and Therefore Does Not Apply Thereto.

The material part of Section 1 of said Act reads as follows:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any *common carrier engaged in interstate commerce* by railroad to use on its line any * * * ." (Italics ours.)
>
> Act of Cong. March 2, 1893, C. 196, 27 Stat. 531.

Five of the alleged violations involved were of Section 2 of said Federal Safety Appliance Act. (Act of Cong. March 2, 1893, C. 196, 27 Stat. 531, as amended by Section 1 of Act of Cong. March 2, 1903, C. 976, 32 Stat. 943.)

The material part of said Section 2 is as follows:

> "That on and after the first day of January, 1898, it shall be *unlawful* for any such *common carrier* to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." (Italics ours.)

The penalty sought to be enforced, is authorized by Section 6 of said Act (Act of Cong., March 2, 1893, C. 196, 27 Stat. 532, as amended by Act of Cong. April 1, 1896, C. 87, 29 Stat. 85.) The material part of this section reads as follows:

> "That any such *common carrier* using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line, any car in violation of any of the provisions of this Act, shall be *liable to a penalty* of $100.00 for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed. * * *" (Italics ours.)

The other four violations involved were of Sections 2 and 3 of the Amendment of 1910 to the Federal Safety Appliance Act (Act of Cong., April 14, 1910, C. 160, 36 Stat. 298) and the regulations of the Interstate Commerce Commission made pursuant thereto. These sections and regulations provided for certain additional safety devices and for a minimum height of drawbars. Section 4 of said Act of 1910 (36 Stat. 299) provides for a penalty similar to that provided for in Section 6 of the original act (*supra*), and the material part thereof reads as follows:

> "That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six."

It is apparent from these statutes that the action is one involving an *unlawful act* and a penalty therefor, and that the penalty is authorized to be collected from the *common carrier* permitting the unlawful act, in this case, hauling or permitting to be hauled the cars defectively or improperly equipped.

The statutes in question do not in terms apply, nor do they purport to apply to a sovereign State.

A sovereign authority is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights and interests of the sovereign.

Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152; 56 L. Ed. 706.

This case involved the construction of various bankruptcy acts and while the decision of the lower Court on the facts was reversed, this Honorable Court apparently affirmed the general principle involved. In the course of its opinion the Court stated that the proposition is established, and quoted, we believe with approval, the following language from the opinion of the United States Circuit Court of Appeals:

> "The decision was expressly put upon the ground 'that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' There was much reasoning to sustain the proposition, and it was especially applied to discharges in bankruptcy. Expressing the general assent to the proposition announced, the court said:
>
> 'Greater unanimity of decision in the courts or of views among text writers can hardly be found

upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, Federal or state, nor among the text writers of this court.'"

(224 U. S. 155, 156.)

U. S. v. Herron, 20 Wall. (U. S.) 251; 22 L. Ed. 275.

In said case the Court held that debts due to the United States were not within the provisions of the Bankruptcy Act then in force and were not barred by a discharge under said Act.

In the course of its opinion, the Court stated (20 Wall. 255):

"Instead of that, the question presented by the assignment of error in this court must depend upon other provisions of the Bankrupt Act, when properly construed, in view of the *settled rule of construction that the sovereign authority of the country is not bound by the words of a statute unless named therein* if the statute tends to restrain or diminish the powers, rights or interests of the sovereign. *Anonymous,* 1 Atk., 262; *Rex v. Earl,* Bunb., 33; *Rex v. Pixley,* Bunb., 202." (Italics ours.)

In Re Fourble, 213 Fed. 677.

In said case, the United States District Court of Maryland, in holding lands and buildings of the State of Maryland to be not subject to mechanics' liens, stated (p. 679):

"The Maryland code, it is true, provides that 'every building * * * shall be subject to a lien' and provides that mechanic's lien laws shall be construed as remedial statutes. Code 1912, Art. 63, Secs. 1 and 41. In none of these statutory provisions is special mention made of the state.

Upon the general rule applicable to all sovereigns, they are not binding upon it. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706."

Sullivan v. School Dist. No. 1, City of Tomah, 179 Wis. 502; 191 N. W. 1020.

Said case involved the question of liability of defendant for an injury arising from an alleged failure to perform a statutory duty to equip saws with safety devices.

The Court held that a demurrer to the complaint had been properly sustained both upon the general ground of non-liability of the School District and upon principles of statutory construction, and in the course of its opinion, stated (179 Wis. 507):

"In connection with what has been said, there is also the general rule, adopted both by this Court and the Supreme Court of the United States, that *general statutes are not to be construed to include, to its hurt, the sovereign. Sandberg v. State,* 113 Wis. 578, 579, 89 N. W. 504; *Dollar S. Bank v. United States,* 19 Wall. 227, 22 L. Ed. 80; *United States v. Verdier,* 164 U. S. 213, 219, 17 Sup. Ct. 42, 41 L. Ed. 407.

In *Milwaukee v. McGregor,* 140 Wis. 35, 121 N. W. 642, 17 Ann. Cas. 1002, it is said:

'The most general words that can be devised * * * affect not the sovereign in the least, if they may tend to restrain or diminish any of his rights and interest.'" (Italics ours.)

The Federal Safety Appliance Act does not name the State of California or any other sovereign. The general language of the statute cannot affect the rights of the sovereign State of California.

Under the above well recognized and basic rules of construction, the second question certified by the United States Circuit Court of Appeals should be answered in the *negative*. Although these rules are *alone* sufficient to require such an answer, we will show in the next two subdivisions of this point, that the said Federal Safety Appliance Act *could not* legally include the State of California, even if the language of the statute purported to do so.

2. The United States Has No Right to Impose a Fine or Penalty Upon the State of California.

The Federal Safety Appliance Act properly fails to refer expressly to a State or other sovereignty because the provisions of said Act and particularly the penalty thereof could not be legally applicable to a sovereign state.

The real nature of the action brought in the District Court was *one by the United States to collect a fine or penalty against the State of California*. Such an action cannot be maintained.

The basic principles that the regulation of commerce between the several states is a power of the Federal Government, and that when exercised, the powers of the Federal Government, in this connection, are supreme, have not been overlooked.

However, there is nothing in the position of the State of California in this action, which, in any way, is contrary to or in denial of said powers. The State of California, through defendants as its Board of State Harbor Commissioners, operates and maintains

the Port of San Francisco, among the facilities of which are included the State Belt Railroad. The State of California attempts to do nothing in any way in violation of any superior law of the United States, applicable to its activities, nor to place any burden upon Interstate Commerce in connection therewith. In connection with the operation of said State Belt Railroad, the State of California neither owns nor controls any cars, nor has any depots, repair shops or any other means or facilities for the loading, handling or repair of cars. It does one simple thing only. It switches over its property from its docks to railroad yards and abutting industries, cars furnished to it by the said railroads. If any such car is being used in the transportation of Interstate Commerce, it is furnished to the State of California in San Francisco, by, and delivered or returned by said State of California in San Francisco, to a *railroad company engaged in Interstate Commerce.*

Any defective car found upon the tracks of the State of California, if used in Interstate Commerce, has been delivered to the State of California in said defective condition by such company. A single exception to the foregoing would involve a car becoming defective while on said State Belt Railroad and Section 4 of the Act of April 14, 1910 (36 Stat. 298), amending and supplementing the said Federal Safety Appliance Act, permits the movement *without penalty,* of such a car to the nearest available point where it can be repaired. For major repairs, such a point, in the case of the State Belt Railroad, would

be the yards of said interstate carrier to which said car was being taken. (R. 2, 3.)(Tr. 27)

Full and complete enforcement of the said Federal Safety Appliance Act can thus be had by compliance therewith by the said railroad companies, and enforcement against them.

The real nature of the action at bar is an attempt by the United States of America to *penalize the State of California for failing to prohibit the passage through its port (and in connection therewith, over its switching tracks) of cars owned and controlled by, and delivered to the said State of California by common carriers subject to the jurisdiction of the United States of America.*

A sovereign State is not liable for the misfeasances, malfeasances, non-feasances or negligence of its officers, agents or servants unless it has voluntarily assumed such liability.

This doctrine is established by authority so cogent and uniform that citation of authorities is almost unnecessary. The rule has been tersely expressed by this Honorable Court in

Robertson v. Sichel, 127 U. S. 507, 515; 32 L. Ed. 203, 206,

as follows:

> "* * * The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and diffi-

culties, and losses, which would be subversive of the public interests. Story, Ag. Par. 319, *Seymour v. Van Slyck*, 8 Wend. 403, 422; *U. S. v. Kirkpatrick*, 22 U. S. 9 Wheat. 720, 735 (6:199, 203); *Gibbons v. U. S.*, 75 U. S. 8 Wall. 269 (19:453); *Whiteside v. U. S.*, 93 U. S. 247, 257 (23:882, 885); *Hart v. U. S.*, 95 U. S. 316, 318 (24:479, 480); *Moffat v. U. S.*, 112 U. S. 24, 31 (28:623, 625); *Schmalz v. U. S.*, 4 Ct. Cl. 142."

Denning v. State, 123 Cal. 316 *(supra)*.

Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754 (supra).

A state cannot be sued as defendant in any Court in this country without its consent except in certain cases in the Supreme Court of the United States.

This principle is too well established to require extensive citation of authorities.

Cunningham v. Macon etc. R. R. Co., 109 U. S. 446; 27 L. Ed. 992.

In said case the Court stated (109 U. S. 451):

"It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any Court in this country without their consent except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that Court by the Constitution.

This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction * * *."

Certain exceptions were then discussed which are not applicable to the case at bar.

Smith v. Reeves, Treasurer of State of California, 178 U. S. 436; 44 L. Ed. 1140;

Constitution of the United States, Amendment Eleven.

Nor is this general rule changed or modified by the fact that the particular activity in question appears to be one sometimes engaged in by private individuals.

Riddoch v. State of Washington, 68 Wash. 329; 123 Pac. 450 (supra).

In said case, the contention was raised that the rule of non-liability applied to Governmental functions only and not to situations where the State was engaged in a private enterprise. The Court, after considering the rule relative to municipal corporations and their liability in certain instances, continued with the following clear exposition of the rule relative to a State, regardless of the type of the activity (68 Wash. 335):

> "On the other hand, *the state is inherently sovereign at all times and in every capacity.* It is the organized embodiment of the sovereign power of the whole people. By reason of this sovereignty, it possesses all powers, but only such powers as are within the limitations of the state constitution and without the prohibitions of the Federal Constitution. *It can do no act except in the exercise of this sovereign power* and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power. *It seems much more logical and much more consonant with the idea and genius of*

sovereignty that the enterprise thus taken over should be impressed with the sovereign character of the state than that the state should become hampered by the private character of the enterprise. The latter result is incompatible with the concept of sovereignty." (Italics ours.)

The above portion of the opinion in *Riddoch v. State* was quoted and expressly approved in *Rauschan v. State Comp. Ins. Fund,* 80 Cal. App. 754, 766 (supra), and the same rule adopted by said Court. The State Compensation Insurance Fund, an agency of the State of California, was held not liable for the torts of its officers, agents or servants committed while in the discharge of their duties as such, because the immunity of a State from liability for such negligence applies regardless of the type of activity involved.

To construe the general language of the Federal Safety Appliance Act and particularly, the penalty provisions thereof to be applicable to a State or other sovereignty would involve the exercise by the United States of a power to fine or impose a penalty upon a sovereign state. The existence of such a power is incompatible with every basic idea of sovereignty and of the relationship between the State and Federal Governments.

The statute, therefore, cannot be construed as applying to the activities of the State of California now before this Honorable Court.

This matter is further discussed in its relation to fining or penalizing public officers in subdivision 3 of this point *infra.*

3. The United States Has No Right to Impose a Fine or Penalty Upon Officers of the State of California For Acts Occurring in the Regular Performance by Them of a Governmental Function of Said State.

The reasoning and rules above urged relating to the State, apply to the imposition of a fine or penalty upon *officers* of the State of California for acts occurring in the regular performance by them of a Governmental function of the State.

The Court will look behind the nominal parties and ascertain who are the real parties to the suit.

In re Ayers, 123 U. S. 443; 31 L. Ed. 216.

As has heretofore been shown, the real party to this action is the State of California as the owner and operator of the State Belt Railroad. The Board of State Harbor Commissioners are appointed by the Governor, confirmed by the Senate of the State of California, and hold office at the pleasure of the Governor.

Political Code of California, Section 2520.

> "On the passage of this act, the Governor must nominate, and by and with the consent of the Senate, appoint three State Harbor Commissioners. Any and all Harbor Commissioners heretofore or hereafter appointed shall hold office at the pleasure of the Governor * * *"

An action by or against a State officer as such is an action by or against the State.

In re Commonwealth of Kentucky v. William Dennison, Governor of the State of Ohio, 24 Howard 66, 16 L. Ed. 717;

Smith v. Reeves, Treasurer of the State of California, 178 U. S. 436, 44 L. Ed. 1140.

In holding said action to be one against the State itself, though in form, against an officer of the State, the Court held (178 U. S. 438):

> "Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers *as treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. * * *"

The above language of Mr. Justice Harlan is squarely in point in connection with the case now before this Court. This action is, in fact, an action against the State of California.

Hopkins v. Clemson Agricultural College, 221 U. S. 636, 642.

> "With the exception named in the Constitution, every state has absolute immunity from suit. *Without its consent it cannot be sued in any court, by any person, for any cause of action whatever.* And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, *but where the proceeding, though nominally against an officer, is really against the state,* or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, *or to do any affirmative act which affects*

the state's political or property rights." (Italics ours.)

Jurisdiction was sustained in said case because it was not an action against the College for a tort committed in the prosecution of a governmental function and because, while the fee was in the State, the corporation (College), as equitable owner, was in the possession, use and enjoyment of the property and did the acts complained of for its own corporate purposes and advantages. The Court held that the State was probably a necessary party as to the relief prayed affecting the land itself and, if so, the removal of an embankment could not be decreed unless the State consented to be sued. Other relief requested was held proper.

Said case is absolute authority for the proposition that the Courts will look behind the nominal parties and will not take jurisdiction where the action is really against the state and affects its political or property rights.

Interference with the activities of the Board of State Harbor Commissioners is a direct interference with the Executive Branch of the Government of the State of California, and affects its political and property rights.

The United States does not possess the right to fine or penalize officers of the sovereign states of the Union for acts occurring in the regular performance by them of a function of State Government.

This proposition would seem axiomatic. If authority be necessary, it is amply furnished by the cases

holding that a State and its Governmental agencies are not subject to taxation by the Federal Government.

> "The power to tax is the power to destroy."
> *M'Culloch v. Maryland,* 4 Wheat. (U. S.) 316; 4 L. Ed. 579.

As the power to tax is the power to destroy, so is the power to fine or penalize an even greater power to destroy!

A State agency is not subject to Federal taxation.

> "That the states cannot tax or otherwise impose burdens on the exclusive powers of the federal government or its instrumentalities employed to carry such governmental powers into execution is beyond question. *The same limitation rests upon the national government as to exclusive agencies of the states unless modified by the Sixteenth Amendment as to taxation which relates to incomes.* Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481; McCulloch v. Maryland, 4 Wheat. 316, 431, 439, 4 L. Ed. 579; Bank of Commerce v. New York City, 2 Black, 620; Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122; United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597; Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Knowlton v. Moore, 178 U. S. 59, 20 Sup. Ct. 747, 44 L. Ed. 969." (Italics ours.)
>
> *United States v. Board of Com'rs. of McIntosh County,* 271 Fed. 747, 750.

The salary of an officer of a State is not subject to Federal taxation.

Buffington v. Day, 78 U. S. 113; 20 L. Ed. 122.

In the course of its opinion in *Buffington v. Day, supra,* this Honorable Court stated:

"(127) * * * and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, *and the exemption of the officer from taxation by the general government,* stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. Erie Co. supra,* from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases, the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; *as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?* (Italics ours.)

Paraphrasing the language of the above opinion, if the means employed by the Government of California in conducting the harbor of San Francisco are subject to fines and penalties imposed by the United States and the consequent control of the

United States, then the Government of California can exist only at the mercy of the United States. Of what avail is the Board of State Harbor Commissioners to the State of California if the United States can fine and penalize them at discretion?

Conclusion of Point B.

The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty. The said Act and certainly the penalty provisions thereof could not legally apply to a sovereign State or to the officers or agents thereof in the course of the performance of their official duties. Therefore, the State Belt Railroad (owned and operated by the State of California) is not subject to said Act.

It is, therefore, respectfully submitted that the second question certified by the Circuit Court of Appeals should be answered in the *negative*.

POINT "C."

IF THE COMPLAINT AND JUDGMENT BE AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY, THEN THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION.

The venue of any action against the State of California, brought by the United States Government, must be in the Supreme Court of the United States.

Constitution of the United States, Article III, Sec. 2.

> "*Original jurisdiction.* The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party,

except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * *"

Judicial Code, Sec. 233; Act of Cong. March 3, 1911, c. 231, Sec. 233, 36 Stat. 1156;

State of Rhode Island v. The State of Massachusetts, 12 Peters 657; 9 L. Ed. 1233;

United States of America v. The State of Texas, 143 U. S. 621; 36 L. Ed. 285.

The Court will look behind the nominal parties and ascertain who are the real parties to the suit.

In re Ayers, 123 U. S. 443; 31 L. Ed. 216 *(supra).*

An action by or against a State officer, as such, is an action by or against the State.

In re Commonwealth of Kentucky v. William Dennison, Governor of the State of Ohio, 24 Howard (U. S.) 66; 16 L. Ed. 717 *(supra);*

Smith v. Reeves, Treasurer of the State of California, 178 U. S. 436; 44 L. Ed. 1140 *(supra);*

Hopkins v. Clemson Agricultural College, 221 U. S. 636 *(supra).*

If the action be against defendants in their official capacity, then the United States District Court did not have jurisdiction of the action. It is, therefore, respectfully submitted that the answer to the third question should also be *"No."*

POINT "D."

THE JUDGMENT CANNOT BE SUSTAINED IF IT BE DEEMED AGAINST DEFENDANTS IN THEIR PRIVATE CAPACITY.

At the outset of the argument upon this point, we are confronted with the case of *McCallum v. United States*, 298 Fed. 373 (United States Circuit Court of Appeals for the Ninth Circuit), which was the first case involving the Federal Safety Appliance Act in connection with the operation of the State Belt Railroad.

The two main points raised in that case were:

First. That the action was one against the State of California, and therefore, contrary to the provisions of the Eleventh Amendment to the Constitution of the United States, and that, in any event, the District Court had no jurisdiction because the United States Supreme Court has the sole and original jurisdiction of an action against the State of California.

Second. That the State Belt Railroad was not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

The United States Circuit Court of Appeals for the Ninth Circuit, in said case, decided *first*, that the action was not one against the State of California or against the Harbor Commissioners in their representative capacity, but was against them in their individual and private capacity to recover penalties for wrongful acts committed in violation of the laws of the United States, not by the State, but by individuals acting as its servants; that the State could not and did not authorize the commission of such wrongful acts, and the immunity of the State from suit did not

relieve state officers from responsibility for their alleged unlawful acts; and *second,* that the State Belt Railroad was a common carrier engaged in interstate commerce and must comply with the provisions of the Federal Safety Appliance Act. Petition for writ of certiorari was denied by the Supreme Court of the United States. (*McCallum v. United States,* 266 U. S. 606.)

The statement of law in *McCallum v. United States (supra),* that the immunity of the State from suit does not relieve State officers from responsibility for their own unlawful action, is unquestionably a correct statement of a general principle of law.

However, we are here concerned with a statute which imposes a *penalty upon a common carrier* and *not upon any individual,* and with a situation in which the individuals sought to be held, did not in any manner *personally participate* in the offense. These matters were *not* presented to and undoubtedly were *not* considered by the Court in the case of *McCallum v. United States (supra).*

It is respectfully submitted that in the said case, the basic fact was overlooked that the Board of State Harbor Commissioners individually and personally committed no wrong; that they individually and personally did no act which they were not authorized and empowered to do by the statutes of the State of California, and that they personally and individually did not violate any statute or law of the United States of America; that they had no more personal connection with any violation of the Federal Safety Appliance

Act occurring on the State Belt Railroad than has the president of an extensive railroad system for a similar violation occurring upon a remote part of that railroad, *and that the Federal Safety Appliance Act imposes a penalty upon the common carrier only and not upon any officer thereof, or any individual whomsoever.*

We believe that the certificate of questions submitted by the said United States Circuit Court of Appeals shows that said Court is no longer satisfied with the holding in *McCallum v. United States (supra)*. It certainly shows that said case is not considered authority by said Circuit Court upon the facts involved in the case now at bar.

It is respectfully submitted that the holding in *McCallum v. United States (supra)* is *erroneous* and that said case should be *overruled.*

1. Defendants Are Not Liable in Their Private Capacity, Because the Act Imposes a Penalty Only Upon the Carrier and Not Upon Any Individual or Officer Thereof.

The Federal Safety Appliance Act provides a penalty against a common carrier only and not against any individual officer or agent of such carrier.

The statute in question is of a quasi criminal nature making it unlawful to do certain acts and imposing a penalty by way of a fine for the commission of such unlawful acts. This statute makes the *common carrier* liable for said penalty but does *not* impose a penalty upon, nor authorize its collection from, anyone other than said common carrier.

The reasonableness of this provision is demonstrated by the fact that a showing of the exercise of reasonable care in equipping cars, as required by said Federal Safety Appliance Act, and the use of due diligence in keeping them in repair by the usual inspection is no defense to the penalty. It has been held that the statute imposes an absolute duty upon the *carrier* which is not discharged by the exercise of reasonable care or diligence.

Chicago, Burlington & Quincy Railway v. United States, 220 U. S. 559; 55 L. Ed. 582.

The placing of such a burden upon a common carrier and the placing of such a burden upon individual officers and employees are entirely different matters. Such a statute must be strictly construed, and its burdens and penalties imposed only as expressly provided in the statute, to wit, upon *the common carrier*.

If there was any doubt as to the construction of the Federal Safety Appliance Act, and the intention of Congress that it apply to *common carriers only*, this doubt is removed by a comparison of the Federal Safety Appliance Act and a somewhat similar statute, the Hours of Service Act. The comparable sections of the said acts are as follows:

FEDERAL SAFETY APPLIANCE ACT.

Act of Cong. March 2, 1893, c. 196, 27 Stat. 531, as amended by Section 1 of Act of Cong. March 2, 1903, c. 976, 32 Stat. 943. Said Section 2 reads as follows, to wit:

"That on and after the first day of January, 1898, it shall be *unlawful* for any such *common carrier* to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." (Italics ours.)

The penalty sought to be enforced is authorized by Section 6 of said Act, supra, 27 Stat., 532, as amended by Act of Cong. April 1, 1896, c. 87, 29 Stat. 85. The material part of this section reads as follows:

"That any such *common carrier* using any locomotive engine, running any train, or hauling or permitting to be hauled, or used on its line, any car in violation of any of the provisions of this Act, shall be *liable to a penalty* of $100.00 for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed * * *" (Italics ours.)

HOURS OF SERVICE ACT.

Act. of Cong. March 4, 1907, c. 2939, 34 Stat. 1415.

Section 1 of said Hours of Service Act commences by providing:

"That the provisions of this Act shall apply to the common carrier or carriers, *their officers, agents and employees*, * * *."

Section 2 of said Hours of Service Act, supra, 34 Stat. 1416, provides in part:

"That it shall be unlawful for any common carrier, *its officers* or *agents* subject to this Act, to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours. * * *" (Italics ours.)

And again, Section 3 of said Hours of Service Act, supra, 34 Stat. 1416 provides:

"That any such common carrier or *any officer or agent thereof* requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof *shall be liable* to a penalty of not to exceed $500.00 for each and every violation. * * *" (Italics ours.)

As hereinabove stated, the sections of the Amendment of 1910 to the Federal Safety Appliance Act herein involved are similar to those above quoted.

In the *Hours of Service Act,* also relative to common carriers engaged in interstate commerce, the *officers* are *expressly* mentioned and *expressly* made liable to the penalty provisions. No such mention of liability of officers or agents is found in the Federal Safety Appliance Act. *The common carrier only is mentioned.*

Congress, in its wisdom, very apparently sought to place the penalty, under the Federal Safety Appliance Act, on the industry only, but, in the Hours of Service Act, where a violation would involve the deliberate misconduct of an officer, the penalty is also placed upon the officer.

In view of the peculiar nature of the Federal Safety Appliance Act, the fact that due diligence is not a defense, and the fact that cars may become defective without fault of any person whomsoever, renders this distinction eminently just.

It therefore, conclusively appears that the Federal Safety Appliance Act assesses a penalty against the common carrier only and does not authorize the assessment of any penalty against any officer.

To sustain the judgment against defendants in their private capacity, plaintiff must establish that defendants *individually* constitute a common carrier. Such is not the fact.

The certificate of the Circuit Court of Appeals contains the following statement of fact:

"5. The Belt Line is operated by the State for the purpose of facilitating commerce of the Port of San Francisco, without any profit being derived therefrom. The charges made for the services rendered by the line are made pursuant to the authority conferred by Section 2524 of the Political Code of California which authorizes collection of such an amount of revenue as will enable the State officers to perform their duties as required of them by authority of Article IX of the Political Code. The defendants are appointive State officers and constitute what under the State statutes is designated as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the Belt Line." (R. 4.) (Tr. 34, 25)

It is, therefore, clear that *if* the State Belt Railroad is a common carrier, then it is the State of California that is such carrier.

In an effort to sustain the judgment plaintiff may urge the theory found in some of its briefs in a similar case in the lower Court that

"while the Board of State Harbor Commissioners acted as authorized by law they acted as a 'Board,' i. e. an agency of the State of California, but at times they conducted the business of a common carrier in a manner not authorized by law. In this latter instance they ceased to act as an official agency. * * *"

Such a far fetched argument is utterly erroneous. There is no question here involved of the Board of State Harbor Commissioners exceeding their authority, or acting under an unconstitutional statute, or doing any of the acts or things which would deprive them of their official capacity and cause them to be acting individually, in contemplation of law.

They were authorized by statute to operate the State Belt Railroad and in operating it, they were performing a portion of their Governmental duties and functions as part of the executive branch of the Government of the State of California. They were conducting a railroad belonging to the State of California. The mere fact that on some part of the State Belt Railroad, a defective car was furnished for switching by some carrier, and inadvertently passed by an inspector does not change *ipso facto,* and by some mysterious process, the official character of these defendants. It is utterly absurd to assume that defendants are at one moment conducting the State Belt Railroad as a Board and agency of the State of California, and at the next, conducting it individually in their private capacity by the mere accident of a defective car being delivered for switching at a remote part of the road. The absurdity of that argument is shown by the fact that, were it correct, the members of the Board of State Harbor Commissioners would be forced to go to their homes in the evening not knowing whether, during the night, they would be conducting the State Belt Railroad as officers of the State of California or in their private capacity, and being powerless to prevent a midnight shift from one capacity to the other—a shift that on plaintiffs' theory, might cost them thousands of dollars in fines and yet occur from causes entirely beyond their control and power to prevent!

Such is not the law.

The Federal Safety Appliance Act does not impose a penalty upon any individual whomsoever. It im-

poses a penalty upon the carrier only. The defendants are not a common carrier in their private capacity and if the judgment be deemed to be against them in such private capacity, it cannot be sustained.

2. Defendants Are Not Liable in Their Private Capacity, Because of the Nature of the Alleged Infractions of Law.

(a) Defendants Cannot Be Held Personally Responsible for Violations of Law (or other tort) Occurring Without Their Personal Knowledge, Participation or Consent and Contrary to Their Orders and Instructions.

The certificate of facts of the Circuit Court of Appeals contains the following statement relative to the lack of personal connection of the defendants with the alleged infractions of law:

> "5. * * * The defendants are appointive State officers and constitute what under the State statutes is designated as the Board of State Harbor Commissioners. They do not personally operate or supervise the operation of the Belt Line. It is operated under the immediate and personal supervision of a superintendent who is appointed and holds office at the pleasure of the Board of State Harbor Commissioners and is under the supervision and control of that Board. His subordinates, inspectors, engineers, and yardmen employed in the operation of the railroad are Civil Service employees of the State, except in cases of emergency employment due to an unusual rush of business. All persons having to do with the maintenance and operation of the road are employees and servants of the State. Among such employees at the times mentioned in the complaint were five inspectors, whose duty it was to make inspections of all appliances covered by the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission issued pursuant thereto."

"6. It is in terms stipulated that the defendants 'did not, in any manner, personally participate in, and had no personal knowledge whatsoever of the commission of any of the alleged violations of the Federal Safety Appliance Act set forth in the causes of action, or any of them, in the complaint herein. That if the violations * * *, or any of them, occurred the said violation so occurred without the personal knowledge of defendants, or any of them, and without the consent of defendants, or any of them, and contrary to the orders and instructions of defendants.'" (R. 4, 5.) (Tr. 28)

The portion of question 4 here under consideration is, whether or not, if the judgment be deemed to be against defendants in their private capacity, it can be sustained in view of the considerations:

"(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge but was contrary to their orders and instructions?" (R. 5, 6.)

There is no authority in the law for holding a public officer personally liable for the infraction of a law (or for any tort) with which he not only had no personal connection but which occurred contrary to his orders and instructions.

The liability of a public officer for his own wrong is clearly established, *but* is limited to *his own wrong.* An examination of any of the leading cases on this subject will clearly demonstrate this principle.

For instance, the decision in *Hopkins v. Clemson College*, 221 U. S. 636, 643, contains the following:

"But immunity from suit is a high attribute of sovereignty, a prerogative of the State itself, which cannot be availed of by public agents when sued for their *own* torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, *they have* injured one of the State's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained, if when violated, the judicial tribunals are forbidden to visit penalties upon *individual offenders.* * * *'" (Italics ours.)

"Besides neither a State nor an individual can confer upon an agent authority to commit a tort so as to *excuse the perpetrator.*" (Italics ours.)

For the public officer to be *personally* liable, he must have *individually participated* in the commission of the tort. In the case at bar there was no such individual participation and the defendants herein cannot be held personally liable.

(b) Defendants as Public Officers Are Not Personally Responsible for the Torts of Their Subordinate Officers.

The principle that a public officer is not responsible for the acts or omissions of subordinate public officers is clearly established.

Michel v. Smith, 188 Cal. 199.

This case involved the liability of a Chief of Police for acts of a subordinate of his department. The Supreme Court of California, in holding the Chief of Police not personally responsible stated the general principle of law as follows (page 201):

"A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done or has personally co-operated therein." (23 Am. & Eng. Ency. of Law, 382; Story on Agency, sec. 319; Robertson v. Sichel, 127 U. S. 507-515 (32 L. Ed. 203, 8 Sup. Ct. Rep. 1286, see also, Rose's U. S. Notes.) See also, note to 12 Ann. Cas. 184.)

Robertson v. Sichel, 127 U. S. 507, 32 L. Ed. 203.

In said case this Honorable Court held that a Collector of Customs was not personally responsible for the negligence of his subordinates in the Custom House department, and in the course of its opinion, stated the general principle as follows (page 515):

"*A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties.* Story, Ag. Par. 319." (Italics ours.)

In another part of its opinion discussing the facts of the particular case, the Court stated (page 514):

"We are of the opinion that there was error in the charge of the court, and that the defendant was not liable for the wrong, if any, committed by his subordinates, on the facts of this case. *There is nothing in the evidence to connect the defendant personally with any such wrong.* No evidence was given that the officers in question were not competent, or were not properly selected for their respective positions. The subordinate who was guilty of the wrong, if any, would un-

> doubtedly be liable personally for the tort, *but to permit a recovery against the Collector, on the facts of this case, would be to establish a principle which would paralyze the public service.* Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person. This principle is well established by authority. * * *" (Italics ours.)

The holding of Mr. Justice Blatchford speaking for the Court in *Robertson v. Sichel (supra),* is peculiarly applicable to the case at bar. Paraphrasing the language of said case, competent persons could not be found to fill the positions of California State Board of Harbor Commissioners if they knew they would be held liable for all the torts and wrongs committed by a body of subordinates operating the State Belt Railroad in the discharge of duties including the inspection of cars, which would be utterly impossible for the State Board of Harbor Commissioners to discharge in person. It would be entirely possible for one train load of cars switched a few miles in a few minutes, without any personal knowledge of the Harbor Commissioners, to involve fines to them approximately equal to a year's compensation. As has been well said by Mr. Justice Blatchford, such a holding establishes a principle which would paralyze the public service.

All persons having to do with the maintenance and operation of the State Belt Railroad are employees and servants of the State. (R. 4.) (Tr. 27) The method of

their employment and qualifications therefor are covered by paragraph 5 of the Facts in the Certificate of the Circuit Court of Appeals. (R. 5.)(Tr. 26-27)

As it affirmatively appears that these defendants had *no* personal connection whatsoever with any of the alleged infractions of the law and that if such occurred, it was *without* their knowledge or consent and *contrary* to their orders and instructions, and that the actual operation was under the supervision of properly selected subordinate employees of the State of California, there is no basis whatsoever for holding defendants liable in their private capacity for any penalty under the Act by reason of the alleged violations thereof.

Conclusion to Point D.

If the judgment be deemed to be against defendants in their private capacity, it cannot be sustained.

The Act imposes a penalty only upon the *carrier,* and not upon any individual. Defendants are *not* a common carrier in their private capacity. Furthermore, defendants cannot be held liable in their private capacity for an alleged infraction of the law due to *no* act or omission upon their part and occurring *not only without* their personal consent, participation and knowledge, *but contrary to their order and instructions.* Defendants cannot be held personally liable for torts of subordinate officers.

It is, therefore, respectfully submitted that the answer to the fourth question certified by the Circuit Court of Appeals should also be in the *negative.*

VI.

CONCLUSION.

In conclusion we submit that all of the questions certified to this Honorable Court by the said United States Circuit Court of Appeals should be answered in the negative.

The State Belt Railroad (owned and operated by the State of California), is not engaged in interstate commerce within the meaning of the Federal Safety Appliance Act. The State of California does *not engage* in *any* commerce.

The Federal Safety Appliance Act does not expressly refer to the State of California, or any other state or sovereignty. It could not legally refer to such sovereignty. The State Belt Railroad (owned and operated by the State of California) is, *not* subject to the Federal Safety Appliance Act.

The United States District Court did not have jurisdiction of this action, if the complaint and judgment be construed as running against defendants in their official capacity.

The judgment *cannot* be sustained if it be deemed to be against defendants in their private capacity, because the Act imposes a penalty *only* upon the "carrier" and defendants are *not* a "carrier" in their private capacity. Furthermore, such a judgment cannot be sustained because it affirmatively appears in the record that the defendants did not own or personally manage or operate the State Belt Railroad, that the alleged infractions of law were due to no act or omission upon their part and that the wrong-doing was

not only without their participation, consent and knowledge, but was contrary to their orders and instructions. Defendants *cannot* be held personally liable for such alleged infractions of law.

The foregoing propositions are in accord with basic and well established principles of law and are amply supported by the authorities.

All of the questions certified by the United States Circuit Court of Appeals must be answered in the negative. Such answers will establish rules of law which will permit the proper exercise by the State of California of a portion of its sovereign power, to wit, maintaining and operating its Port of San Francisco, unhampered and unburdened by fines and penalties imposed by another sovereign power. Under such rules of law, persons of responsibility may act as members of the Board of State Harbor Commissioners without fear that their private means will be unjustly subjected to penalties for alleged wrongful acts which occur contrary to their orders and instructions and over which they have no control.

Such answers will not, in any way, interfere with or hamper the United States in enforcing the provisions of the Federal Safety Appliance Act. There is no conflict between the State of California and the United States in this matter. The State even employs special inspectors who, through their inspection of appliances covered by the Federal Safety Appliance Act, cooperate in its enforcement. But the State and its officers *need not* and *cannot* be penalized because the railroad companies engaged in interstate commerce, owning and operating defective cars, deliver

them to the State Belt Railroad for switching. Complete enforcement of the Federal Safety Appliance Act can and should be had by proceeding against said companies, who are the real and only ones at fault.

We submit that the questions of law certified to this Honorable Court by the United States Circuit Court of Appeals for the Ninth Circuit, should *all* be answered in the *negative*.

Dated, San Francisco,
March 26, 1930.

Respectfully submitted,

LEON E. MORRIS,
Counsel for Appellants.

EDWARD M. JAFFA,
Of Counsel.